

DNRC Investigation and Enforcement Process

The Department strives to work with individuals to bring them into compliance with the Water Use Act.

1. The Department investigates non-compliance upon receiving a complaint. The complaints are almost always filed by other water users who are adversely affected by the activity of the alleged violator.
2. Upon receipt of a complaint, the Department will investigate the water use and meet with the water user. The findings of the investigation are shared with both the person filing the complaint and with the alleged violator.
3. If the water user is not in compliance with the Water Use Act, the Department will suggest options to the water user to come into compliance. The vast majority of complaints are resolved informally without court action.
4. The Department has historically held in abeyance taking the alleged violator to district court for enforcement if the water user has filed an application for a permit for a new water use or change in existing water right, until such time as the Department issued a decision on the application.
5. The Department only considers court action (injunction or fines) if the violator refuses to come into compliance voluntarily, or is unsuccessful in obtaining a water right but continues to violate statute.

The Department has only taken three complaints to district court out of the hundreds of complaints we have received over the last ten years including the complaint against Mr. Bouma. In the two cases other than Bouma, the Department settled with the violator and agreed to forego penalties in return for them coming into compliance with the law. An additional action filed by the Gallatin County Attorney was also successful in resolving an unauthorized use of water.

In 2009, the legislature passed HB 39, removing the requirement for DNRC to seek voluntary compliance prior to seeking judicial enforcement. §85-2-114, MCA (2009). HB 39 was a WPIC Bill. Nonetheless, the Department continues to seek voluntary compliance with the Water Use Act even though we are no longer required to do so first.

Synopsis of Facts for Mr. Bouma

The DNRC actively sought to work with Mr. Bouma and his predecessor, Mr. Poulsen, to bring them into voluntary compliance with the Water Use Act. Staff from the DNRC Lewistown Regional Office had multiple conversations and site visits with Mr. Bouma (and previously, Mr. Poulsen) regarding options to come into compliance. The Department allowed both men to pursue permit and/or change applications and held enforcement in abeyance while the applications were pending. It was only after the last permit application was denied and attempts to work with Mr. Bouma to remove the illegal dams failed that the Department pursued judicial enforcement. A brief review of the relevant facts is as follows.

1. There are three dams located in succession on an unnamed tributary of the Sun River, clustered in a relatively small area. All three dams are located in the SE¼ of Section 18, T21N, R1E, Cascade County. The ponds were originally built by Harold Poulsen.
2. The ponds are located in the Upper Missouri River Basin closure, §§85-2-342 and -343, MCA, subject to appropriation only under specified exceptions. The Upper Missouri is closed because it is over-appropriated.
3. Mr. Poulsen filed an application for a water right permit for the ponds (16.05 acre feet) in *Application for Beneficial Water Use Permit 41J-11226000*, dated August 16, 2001. There were multiple objections to Application and the Application went to a contested case hearing before the Department under the Montana Administrative Procedure Act. Testimony demonstrated that the ponds caused the perennial stream to stop flowing below the ponds, adversely impacting downstream water rights holders. It was Poulsen's representation that the stream was perennial. The Hearing Examiner denied the Application in December 2002, for failure to prove water was legally available, lack of adverse effect to other appropriators, adequate diversion works, and beneficial use of water under §85-2-311, MCA. Mr. Poulsen did not appeal the Department's decision to the district court.
4. Mr. Bouma purchased the property from Mr. Poulsen in 2005. Mr. Bouma apparently enlarged at least one of the ponds in the spring of 2009. This action brought him to the attention of the Cascade County Conservation District due to violation of the Natural Streambed and Land Preservation Act for work in the streambed without a 310 permit from the Conservation District.
5. The Department received a water use complaint on May 21, 2009, from another appropriator on the source that identified the dams as unpermitted and impounding water. The Department confirmed that there is no water right authorizing the impoundment or storage of water for any purpose or beneficial use for any of the three dams. The Department informed Mr. Bouma of the findings of its investigation on June 24, 2009. The Department explained to Mr. Bouma that he needed to either obtain a water right or remove the impoundments, and requested that Mr. Bouma provide a plan to the Department as to how he would come into compliance with the Water Use Act. The Department agreed to allow him time to come into compliance. The Department granted Mr.

Bouma an extension of time to file a water right application at the request of his water right consultant.

6. Mr. Bouma applied to change a water right to cover the same dams and impoundments as Poulsen's application that was previously denied, but provided different capacities. The application was change *Application 41K 30046785* filed on September 2, 2009, and terminated at Mr. Bouma's written request on January 26, 2010. The reason given for the termination request was that Mr. Bouma wanted to file a permit application.

7. Mr. Bouma filed for a water right permit in *Application 41K 30047949*, received by the Department on January 26, 2010. The Application was terminated on June 2, 2010, because the Application did not qualify for any exception enumerated in the basin closure exceptions pursuant to §85-2-343, MCA and no further action could be taken on the Application as a matter of law. Mr. Bouma did not appeal the termination to district court.

8. On October 25, 2010, the Department wrote to Mr. Bouma and Mr. Poulsen again notifying them that there was no water right for the impoundments and they needed to be removed. The Department requested a commitment from Mr. Bouma by November 5, 2010, to remove the dams or it would seek court action.

9. Mr. Bouma hired an attorney the week of November 4, 2010, and the firm requested additional time to review the matter and attend a meeting with the Conservation District (CD). The Department agreed to additional time for the attorney review of the situation and to attend the CD meeting.

10. The Department sent Bouma's attorney a letter dated November 10, 2010, indicating that it would file the district court action as neither Mr. Bouma nor his counsel attended the CD meeting. The Department again reiterated that it did not wish to litigate the matter and it would prefer that Mr. Bouma put his resources toward resolving the situation. However, because all of the stated deadlines had passed and no action had been taken by Mr. Bouma, the Department would be filing the complaint in District Court. The Department provided Bouma's attorney with a courtesy copy of the complaint it would be filing.

11. The Department filed its Complaint in District Court November 16, 2010, after all attempts to achieve voluntary compliance over a 17-month period had failed. The Complaint alleged that the impoundments violated the Water Use Act and should be removed

12. After extensive discovery by Mr. Bouma, he and the Department both filed opposing motions for summary judgment. The District Court granted the Department summary judgment on December 22, 2011, and Judgment was entered by the Court on February 15, 2012.

13. Mr. Poulsen and the Department entered into a Stipulation settling his liability in January, 2012.

14. The Judgment and Order on February 15, 2012, required Mr. Bouma to remove the dams and not merely breach the dams.

15. The District Court directed Mr. Bouma to complete removal of the dams and restoration of the stream flow within 9 months from the date judgment is entered. The Judgment further required Mr. Bouma to pay a per diem penalty under §85-2-122(1), MCA, at the daily rate of \$50 beginning December 23, 2011, until such time as Mr. Bouma fully complied with the Court's Order.

16. Mr. Bouma did not appeal the District Court's decision to the Montana Supreme Court.

17. Mr. Bouma did not remove the dams during the summer of 2012.

18. Mr. Bouma hired a new attorney in April, 2012 and new attorney filed a Motion for Relief from Judgment dated November 21, 2012, alleging additional, new arguments. This issue was litigated and the District Court denied the Motion and reiterated its original decision by Order dated January 22, 2013.

19. By letter dated March 20, 2013, the attorney for Mr. Bouma notified DNRC that Mr. Bouma had removed the dams February 23, 2013. The Department inspected the property and accepted that as the date the dams were removed.

20. Based on the Court's Order, Mr. Bouma's penalty calculated from the date of the Court Order through the date Mr. Bouma removed the dams at \$50/day totaling \$21,350.